Pembinaan Thin Chai Sdn Bhd v Citra Muda Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5-22-09 OF 2000
ABDUL MALIK ISHAK J
16 MAY 2002

Civil Procedure *— Summary judgment — Triable issues — Partnership accounts yet to be resolved — Whether partnership dissolved when first defendant wound up — Whether first defendant could sign the subcontract on behalf of the second defendant — Second defendant's averments were unchallenged — Whether O 14 application was the appropriate cause of action — Rules of the High Court 1980 O 14*

The first defendant and the second defendant entered into a joint venture agreement with a consortium known as Konsortium Citra Kontraktor Nusantara ('KCKN'). These joint venture partners awarded a construction contract to the plaintiff, which the plaintiff completed. Accordingly, the plaintiff submitted a final progress claim for the sum of RM351,386.84. A retention sum amounting to RM111,255.82 was also claimed on the ground that it was due for release to the plaintiff. By two letters issued through its solicitors, the plaintiff demanded these amounts but the first defendant, second defendant and/or KCKN did not pay the same. The plaintiff applied for summary judgment only against the second defendant, presumably because the first defendant had been wound up by the Kuantan High Court on 20 June 2000. The deputy registrar dismissed the application and this was the plaintiff's appeal. The second defendant contended that the plaintiff failed to cite KCKN as a party to the suit when it was the first and the second defendants, together with KCKN, who had awarded the contract to the plaintiff. The contract in question was not exhibited to the affidavit in support of the plaintiff's application. Instead, a subcontract containing various discrepancies in the name of the parties involved was exhibited. In the second defendant's affidavit in reply, which was not replied to by the plaintiff, it was averred that the second defendant did not execute the subcontract. Indeed, the existence of the subcontract was questioned. The second defendant also disputed receiving the letters of demand.

Held, dismissing the appeal with costs:

(1) The discrepancies contained in the subcontracts when viewed in its correct perspective must be construed adversely against the plaintiff and it would certainly constitute a triable issue in favour of the second defendant (see p 115F).

(2) It seemed that the plaintiff had admitted that the joint venture agreement between the first and second defendants with KCKN were in the nature of a partnership and it was this partnership that

awarded the contract in question to the plaintiff. In order to determine whether a partnership exists, it would be ideal to refer to the rules in s 4 of the Partnership Act 1961 ('the Act'). These rules are not exhaustive and regard must be had to all the surrounding circumstances together with the intentions of the parties involved and the contracts which they had made. It would have been pertinent to examine the contract in question, but that contract was not exhibited. In any event, KCKN was certainly a party to the joint venture agreement and thus KCKN must be cited as a party in the suit but this was not done at all (see pp 114G–H, 115B–C, G–H).

(3) 'An order for the winding up of a corporate partner is the nearest equivalent to the bankruptcy of an individual' (*Lindley and Banks on Partnership Law*). Therefore, the winding up of the first defendant affected the joint venture partners. The second defendant and KCKN would also be affected. Since the first defendant had been wound up, the partnership accounts must be resolved amicably between the parties before the O 14 application could be heard (see p 116B–D).

(4) Under s 35 of the Act, the partners may agree that death or bankruptcy shall not affect a partnership but, in the absence of such an agreement, the partnership is dissolved upon any such occurrence by operation of law. An agreement between the partners must necessarily mean an agreement between all of them entered into before the date of the relevant death or bankruptcy and an agreement of this nature should be definite and certain. Here, the affidavit evidence did not make any reference to any agreement governing the dissolution of the partnership in the event of death or bankruptcy of any of the partners. It follows therefore that in the absence of such an agreement, the partnership would automatically be dissolved on 20 June 2000 when the Kuantan High Court made a winding up order of the first defendant. These legal issues can only be ventilated to the fullest in the course of the trial and thus the O 14 application ought not to be entertained (see pp 116F–H, 117C).

(5) There was no express authority given to the first defendant to execute the subcontract and that being the case, the issue of an express authority can only be ventilated and determined at the trial proper (see p 117E).

(6) The first defendant had no implied authority to sign the subcontract on behalf of the second defendant and therefore the execution of the subcontract by the first defendant could not, in law, bind the second defendant at all (see p 117H).

(7) As there was no reply to the second defendant's affidavit in reply, the averments therein remained unchallenged. Consequently, an O 14 application would not be the appropriate course of action for the plaintiff to undertake (see p 118A).

(8) The letters of demand were not accompanied by any proof of posting. There was no attempt at all by the plaintiff to show by affidavit evidence that these two letters of demand were in fact served on the second defendant (see p 118A–C).

(9) The two letters of demand merely claimed for the sum of RM351,386.84. The sum of RM111,255.82 was not even mentioned at all. To confound the matter further, there was no supporting document to prove the exact amount that was claimed by the plaintiff (see p 118C–D).

[**Bahasa Malaysia summary**

Defendan pertama dan defendan kedua telah memasuki satu perjanjian usahasama dengan sebuah konsortium yang dikenali sebagai Konsortium Citra Kontraktor Nusantara ('KCKN'). Rakan-rakan kongsi usahasama ini telah memberikan kontrak pembinaan kepada plaintif, yang mana telah disiapkan oleh plaintif. Sehubungan itu, plaintif telah mengemukakan satu tuntutan kemajuan muktamad bagi jumlah sebanyak RM351,386.84. Satu jumlah penahanan yang berjumlah sebanyak RM111,255.82 telah juga dituntut atas alasan bahawa ianya telah sampai tempohnya untuk dibayar kepada plaintif. Melalui dua surat yang telah dikeluarkan melalui peguamcaranya, plaintif telah menuntut jumlah-jumlah ini tetapi defendan pertama, defendan kedua dan/atau KCKN tidak membayarnya. Plaintif telah memohon untuk mendapatkan penghakiman terus hanya terhadap defendan kedua, mungkin kerana defendan pertama telah digulung oleh Mahkamah Tinggi Kuantan pada 20 Jun 2000. Timbalan pendaftar telah menolak permohonan tersebut dan ini adalah rayuan plaintif. Defendan kedua menegaskan bahawa plaintif telah gagal untuk menyebut KCKN sebagai satu pihak kepada guaman tersebut sedangkan ianya merupakan defendan-defendan pertama dan kedua, bersama-sama dengan KCKN, yang telah memberikan kontrak tersebut kepada plaintif. Kontrak yang dipersoalkan telah tidak diekshibitkan kepada afidavit menyokong permohonan plaintif. Sebaliknya, satu subkontrak yang mengandungi pelbagai percanggahan atas nama pihak-pihak yang terlibat telah diekshibitkan. Dalam afidavit jawapan defendan kedua, yang mana telah tidak dijawab oleh plaintif, telah ditegaskan bahawa defendan kedua tidak menyempurnakan subkontrak tersebut, kewujudan subkontrak tersebut telah dipersoalkan. Defendan kedua juga mempertikaikan penerimaan surat-surat tuntutan tersebut.

Diputuskan menolak rayuan dengan kos:

(1) Percanggahan yang terkandung di dalam subkontrak tersebut apabila dikaji dalam bentuknya yang betul; mestilah ditafsirkan sebagai menentang plaintif dan ianya pasti akan membentuk isu yang boleh dibicarakan yang berpihak kepada defendan kedua (lihat ms 115F).

(2) Nampaknya plaintif telah mengaku bahawa perjanjian usahasama antara defendan-defendan pertama dan kedua dengan KCKN adalah bersifat perkongsian dan perkongsian ini yang telah mengawardkan kontrak yang dipersoalkan kepada plaintif. Demi untuk menentukan sama ada sesuatu perkongsian wujud, ianya adalah ideal untuk merujuk kepada kaedah-kaedah di dalam s 4 Akta Perkongsian 1961 ('Akta tersebut"). Kaedah-kaedah ini tidak mendalam dan pertimbangan mestilah diberikan kepada semua keadaan disekelilingnya bersama-sama dengan niat pihak-pihak yang terlibat dan kontrak-kontrak yang telah mereka buat. Ianya adalah bersangkutan untuk memeriksa kontrak yang dipersoalkan itu, tetapi kontrak itu tidak diekshibitkan. Dalam sebarang keadaan, KCKN pastinya merupakan satu pihak kepada perjanjian usahasama tersebut dan oleh itu KCKN mestilah disebut sebagai satu pihak dalam guaman tersebut tetapi perkara ini telah tidak dilakukan sama sekali (lihat 114G–H, 115B–C, G–H).

(3) 'An order for the winding up of a corporate partner is the nearest equivalent to the bankruptcy of an individual' (*Lindley and Banks on Partnership Law*). Oleh itu, penggulungan defendan pertama menjejaskan perkongsian usaha sama tersebut. Defendan kedua dan KCKN akan juga terjejas. Oleh kerana defendan pertama telah digulung akaun perkongsian itu mestilah diselesaikan secara berbaik-baik antara pihak-pihak tersebut sebelum permohonan A 14 boleh didengar (lihat ms 116B–D).

(4) Di bawah s 35 Akta tersebut, rakan-rakan kongsi tersebut boleh bersetuju bahawa kematian atau kebankrapan tidak akan menjejaskan perkongsian tersebut tetapi, dalam ketiadaan perjanjian yang sedemikian, perkongsian tersebut dibubarkan setelah berlakunya sedemikian menurut undang-undang. Sesuatu perjanjian antara rakan-rakan kongsi tersebut semestinya bermaksud satu perjanjian antara kesemua dari mereka yang telah dimasuk sebelum tarikh kematian atau kebankrapan yang relevan itu dan perjanjian yang bersifat seperti ini seharusnya pasti dan khusus. Di sini, keterangan afidavit tidak merujuk kepada mana-mana perjanjian yang menguasai pembubaran perkongsian tersebut sekiranya berlaku kematian atau kebankrapan mana-mana daripada rakan-rakan kongsi tersebut. Diikuti oleh itu bahawa dalam ketiadaan perjanjian yang sedemikian, perkongsian tersebut haruslah secara otomatik dibubarkan pada 20 Jun 2000 apabila Mahkamah Tinggi Kuantan membuat satu perintah penggulungan defendan pertama. Isu-isu undang-undang ini hanya boleh dihuraikan sepenuhnya dalam perjalanan perbicaraan dan oleh itu permohonan A 14 tidak seharusnya dilayan (lihat ms 116F–H, 117C).

(5) Tiada kebenaran nyata diberikan kepada defendan pertama untuk menyempurnakan subkontrak tersebut dan dalam keadaan itu, isu kebenaran nyata hanya boleh dihuraikan dan ditentukan di perbicaraan yang sempurna (lihat ms 117E).

(6) Defendan pertama tidak mempunyai kebenaran tersirat untuk menandatangani subkontrak tersebut bagi pihak defendan kedua dan oleh itu penyempurnaan subkontrak tersebut oleh defendan pertama tidak boleh, di sisi undang-undang, mengikat defendan kedua sama sekali (lihat ms 117H).

(7) Oleh kerana tiada jawapan kepada afidavit jawapan defendan kedua, penegasan-penegasan di dalamnya kekal tidak dicabar. Akibatnya, satu permohonan A 14 tidak akan menjadi jalan tindakan yang sempurna untuk plaintif lakukan (lihat ms 118A).

(8) Surat-surat tuntutan telah tidak diiringi oleh sebarang bukti pengeposan. Tidak terdapat sebarang percubaan oleh plaintif sama sekali untuk menunjukkan melalui keterangan afidavit bahawa kedua-dua surat ini telah pada hakikatnya disampaikan ke atas defendan kedua (lihat ms 118A–C).

(9) Kedua-dua surat tuntutan tersebut hanya menuntut bagi mendapatkan jumlah RM351,386.84. Jumlah sebanyak RM111,255.82 tidak disebut sama sekali. Untuk mengelirukan perkara tersebut selanjutnya, tidak terdapat dokumen sokongan untuk membuktikan jumlah yang tepat yang telah dituntut oleh plaintif (lihat ms 118C–D).

Notes

For cases on triable issues, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 6103–6173

Cases referred to

Alliance Bank Ltd v Kearsley (1871) LR 6 CP 433 (refd)

Amanah Merchant Bank Bhd v Lim Tow Choon [1994] 1 MLJ 413 (refd)

Anglo-Italian Bank v Wells and Davies (1878) 38 LT 201 (refd)

Arcus v Richardson (1933) NZLR 348 (refd)

Aw Yong Wai Choo & Ors v Arief Trading Sdn Bhd & Anor [1992] 1 MLJ 166 (refd)

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)

Brettel & Ors v Williams & Ors (1849) 4 Exch 623 (refd)

Chooi Siew Cheong v Lucky Height Development Sdn Bhd & Anor [1995] 1 MLJ 513 (refd)

Crawford v Stirling (1802) 4 Esp 207 (refd)

Green v Sutton (1840) 2 Mood & R 269 (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)

Stead v Salt (1825) 3 Bing 101 (refd)

Steiglitz & Anor v Egginton & Ors (1815) Holt NP 141 (refd)

Tac Construction & Trading v Bennes Engineering Bhd [1999] 2 CLJ 117 (refd)

Legislation referred to

Partnership Act 1961 ss 3(1), 4, 11, 35, 36
Rules of the High Court 1980 O 14, O 77 r 1

Ajit Kumar Hastir (*Chooi & Co*) for the plaintiff.
YM Tengku Azlina bte Tengku Ismail (*Tengku Azlina, Rao, Low & Associates*) for the second defendant.

Abdul Malik Ishak J:

Introduction

The learned deputy registrar heard and dismissed with costs the plaintiff's application for summary judgment under O 14 of the Rules of the High Court 1980 ('RHC') against the second defendant as seen in encl 8. Aggrieved by that decision, the plaintiff filed an appeal to the judge in chambers as seen in encl 11. In encl 8, the plaintiff sought for summary judgment against the second defendant in the following terms:

(1) for payment of the sum of RM351,386.84 with interest at the rate of 8% pa from 8 April 1998 to the date of full payment;

(2) for payment of the sum of RM111,255.82 with interest at the rate of 8% pa from 8 April 1998 to the date of full payment;

(3) any other relief which the court feels appropriate; and

(4) costs.

The plaintiff was only interested to pursue the matter against the second defendant. The first defendant was wound up by the Kuantan High Court on 20 June 2000, and perhaps it was because of this that the plaintiff left the first defendant alone. But the winding up of the first defendant was certainly a reckoning point in favour of the second defendant and I shall certainly allude to this very essential element in the later part of this judgment.

Facts

The statement of claim showed that the first defendant and the second defendant had entered into a joint venture agreement with a consortium known as Konsortium Citra Kontraktor Nusantara ('KCKN') which operated under the name and style of CM-RB-KCKN. Thereafter, both the first and the second defendants together with KCKN awarded a contract known as the KL International Airport Aprons and Taxiways W2/X3-South, contract no KLIA/d/RAO5/042/95 to the plaintiff by way of a letter dated 12 May 1997, and that very letter was exhibited as exh 'CSPI' to the affidavit of Chai Seong Peng that was affirmed on 30 June 2000 as seen in encl 7 and it was worded in this way:

CM-RB-KCKN JOINT VENTURE

Contact Address: 5th Floor, Block B, Wisma Semantan,
No 12, Jalan Gelenggang, Bukit Damansara, 50490 Kuala Lumpur, Malaysia.

A Tel: (03) 2538421 Fax: (03) 2538431

Our Ref: CM/HQ/KLIA/21/4–97 12 May 1997

Pembinaan Thin Chai Sdn Bhd
9-2, Jalan SB Indah 1/2A
Off Jalan Balakong
B Taman Sg Besi Indah
43300 Seri Kembangan, Selangor

Attention: Mr Chai Seong Peng
KL International Airport
Aprons & Taxiways W2/X3-South
Contract No KLIA/D/RAO5/042/95

C

Subject: Laying of Pavement Quality Concrete-Labour and Equipment Only Letter of Acceptance

Dear Sir,

With reference to our earlier letter dated 4 April 1997, and reference no CM/ADM/SO/PTC/652/4–97, in which we advised that the subcontract D agreement would be issued shortly, we have pleasure in enclosing the agreement for your acceptance and signature. The following should be noted:

1 this agreement has been prepared in accordance with the requirements of our contract with the KLIAB using the standard forms contained herein, to which we are bound to conform;

E 2 this letter should be treated as the letter of acceptance referred to in art 2(b) on p APP9/1 of the articles of agreement;

3 the articles of agreement should be signed and witnessed as noted, and the omission of the performance bond on pp APP 9/2 of the articles of agreement and APP 9/2 of the conditions of subcontract duly initialled;

4 the agreed rates for the work are shown in Table 1. Attached to the F articles of agreement, which supercede those shown in your earlier quotation dated 24 February 1997, and have been initialled jointly on your letter of 24 February 1997 which is attached as part of the subcontract documentation;

5 your work will be measured as executed for final payment;

6 the programme is attached to Appendix A; G

7 completion of Appendices B and C of the conditions will also be required and we can discuss these matters with you if necessary;

8 a retention sum of 5% of each interim certificate is to be deducted, and will be repaid three (3) months after final completion of the works has been certified;

H 9 please initial all pages and your return of the signed subcontract agreement to us by 31 May 1997 would be appreciated for regularization and administration of contractual procedures.

Thank you for your co-operation in this matter.

Yours faithfully,
for and on behalf of
I Citra Muda/Readybuilt/Konsortium Citra Kontraktor Nusantara Joint Venture
Sgd (Illegible).

Siti Musyarofah
Managing Director
cc: Mr Martin Mc Clenn, Construction Manager
Mr Tony Artlett, QS Manager

It was said that the plaintiff had completed the works under the said contract in December 1997 in accordance with the terms thereto and had submitted the final progress claim dated 8 April 1998 for the sum of RM351,386.84. It was also said that on 1 April 1998, the retention sum amounting to RM111,255.82 became due for release to the plaintiff. By letters dated 18 June 1999 (see exh 'CSP3' of encl 7) and 11 October 1999 (see also exh 'CSP3' of encl 7) that were issued through the plaintiff's solicitors, the plaintiff demanded for the final progress claim amounting to RM351,386.84 and the retention sum amounting to RM111,255.82. Despite the aforesaid letters of demand, both the first and the second defendants, together with KCKN had failed, refused and/or neglected to pay the sums as demanded or any part thereof.

It must be pointed out that the second defendant had filed its statement of defence on 25 February 2000 as seen in encl 4. In *Tac Construction & Trading v Bennes Engineering Bhd* [1999] 2 CLJ 117, where the defendant there had yet to file its statement of defence, I had this to say in regard to an O 14 application (see p 122 of the report):

> It is now trite law that an O 14 application is to enable a plaintiff to obtain a summary judgment without trial provided:
>
> (1) the plaintiff can prove his claim clearly; and
>
> (2) the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried.

To borrow the words of Mohamed Azmi SCJ in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 at p 408, I must 'be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable'.

Triable issues

There were triable issues in the present appeal, and I will now venture to itemize them.

It was the stand of the second defendant that the plaintiff had failed to cite KCKN as a party to the suit bearing in mind that both the first and the second defendants, together with KCKN had awarded the contract no KLIA/d/RAO5/042/95 to the plaintiff. It seemed that the plaintiff had admitted that the joint venture agreement between the first and the second defendants with KCKN were in the nature of a partnership that operated the CM-RB-KCKN operations. And it was this partnership that awarded the contract no: KLIA/d/RA05/042/95 to the plaintiff. Order 77 r 1 of the RHC states as follows:

> Subject to the provisions of any written law, any two or more persons claiming to be entitled, or alleged to be liable, as partners in respect of a cause of action and carrying on business within the jurisdiction may sue, or be sued, in the

A name of the firm (if any) of which they were partners at the time when the cause of action accrued.

and it is my considered view that it applies only to firms and single individuals suing or being sued in their firm or trading name. Now, under s 3(1) of the Partnership Act 1961 (Act 135) a partnership is defined as the B relation which subsists between persons carrying on business in common with a view to profit. In order to determine whether a partnership exists, it would be ideal to refer to the rules in s 4 of the Partnership Act 1961 (Act 135) which according to *Aw Yong Wai Choo & Ors v Arief Trading Sdn Bhd & Anor* [1992] 1 MLJ 166 and *Chooi Siew Cheong v Lucky Height Development Sdn Bhd & Anor* [1995] 1 MLJ 513 were not exhaustive and C that regard must be had to all the surrounding circumstances together with the intentions of the parties involved and the contracts which they have made. These cases merely enunciated general principles of law and in the context of the present appeal, it would be pertinent to examine the contract no KLIA/d/RAO5/042/95. But alas, that contract was not exhibited in the affidavit of Chai Seong Peng in encl 7. What was exhibited was the D subcontract between:

> Citra Muda Sdn Bhd /Ready Built/Konsorsium Citra Kontraktor Nusantara Joint Venture
> and
> Pembinaan Thin Chai Sdn Bhd

E and that subcontract bore the following number, namely, CMRBKCKNJV/KLIA/RAO5/C–01/97. To confound the matter further, the name of the second defendant that appeared in the subcontract was 'Reday Built' whereas the present suit from which the present appeal was related to, described the second defendant as 'Readybuilt (M) Sdn Bhd'. Going further and looking at the preamble to the subcontract, the second F defendant was described as 'Readybuilt Sdn Bhd' and not as 'Readybuilt (M) Sdn Bhd.' These discrepancies when viewed in its correct perspective must be construed adversely against the plaintiff and it would certainly constitute a triable issue in favour of the second defendant. Going further still, the other partner to the joint venture was described in the subcontract G as 'Konsorsium Citra Kontraktor Nusantara Joint Venture', whereas the preamble to the subcontract described the other partner as 'Citra Kontraktor Nusantara Joint Venture'. The consortium known as 'Konsortium Citra Kontraktor Nusantara' which was referred to as 'KCKN' in the brief facts as alluded to earlier, was certainly a party to the joint venture agreement. KCKN or by whatever name it is called must be H cited as a party in the present suit wherein the present appeal arose, but this was not done at all. Perhaps, as was rightly submitted by the second defendant's counsel, the plaintiff should have commenced the suit against:

(1) Citra Muda Sdn Bhd

(2) Readybuilt (M) Sdn Bhd

I (3) Konsortium Citra Kontraktor Nusantara

(Ketiga-tiganya rakankongsi di bawah satu perkongsian yang dinamakan CM-RB-KCKN JOINT VENTURE).

Flowing from all these, the O 14 application must fall in limine.

The winding up order against the first defendant by the Kuantan High Court as alluded to earlier gave a different complexion to the present appeal. *Lindley and Banks on Partnership Law* at paras 24–25 carries the following legend:

> Winding-up order
>
> An order for the winding up of a corporate partner is the nearest equivalent to the bankruptcy of an individual.

and this must be read with s 11 of the Partnership Act 1961 (Act 135) which enacts as follows:

> Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied but subject to the prior payment of his separate debts.

In essence, the winding up of the first defendant shall affect the joint venture partners as well. In this connection, the second defendant and KCKN would also be affected. Since the first defendant had been wound up, the partnership accounts must be resolved amicably between the parties thereto before the O 14 application could be heard.

I must proceed further.

Section 35 of the Partnership Act 1961 (Act 135) provides as follows:

> (1) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.
>
> (2) A partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under this Act for his separate debt.

and clearly under the above provisions, the partners may agree that death or bankruptcy shall not affect a partnership but, in the absence of such an agreement, the partnership is dissolved upon any such occurrence by operation of law. In my judgment, an agreement between the partners must necessarily mean that an agreement between all of them entered into before the date of the relevant death or bankruptcy (*Arcus v Richardson* (1933) NZLR 348) and that an agreement of this nature should be definite and certain. Here, the affidavit evidence did not make any reference to any agreement governing the dissolution of the partnership in the event of death or bankruptcy of any of the partners. It follows therefore that in the absence of such an agreement, the partnership would automatically be dissolved on 20 June 2000 when the Kuantan High Court made a winding up order of the first defendant. In sharp contrast would be the case of *Arcus v Richardson* where the court there held that where an arrangement that the partnership was not to be dissolved by the death or bankruptcy of a partner then the partnership would be construed to be for an undefined period of time.

A dissolution of the partnership by operation of law is provided for in s 36 of the Partnership Act 1961 (Act 135). That section enacts as follows:

> A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership.

and it is a reflection of the common law rule that the parties to a contract are discharged from their obligation by the supervening illegality. This is the only section in the Partnership Act 1961 (Act 135) which compels dissolution, regardless of the wishes of some of the partners.

These legal niceties can only be ventilated to the fullest in the course of the trial.

The upshot of it all would be this. That the O 14 application ought not to be entertained by this court.

The subcontract number CMR BKCKNJV/KLIA/RAO5/C–01/97 was executed by the first defendant and not by the second defendant. This averment was made by Radin Baharuddin bin Radin Haji Munir in his affidavit in reply that was affirmed on 21 July 2000 and filed on the same date as seen in encl 9 at para 8 thereto. There was no reply to this affidavit in reply in encl 9 and so this very averment remained unchallenged (*Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281). Incidentally, there was no express authority given to the second defendant to execute the subcontract and that being the case, the issue of an express authority can only be ventilated and determined at the trial proper. It must be borne in mind that a partner has no implied authority to bind the firm in the following situations:

(a) by executing a deed on behalf of the firm (*Steiglitz & Anor v Egginton & Ors* (1815) Holt NP 141, [1814–23] All ER Rep 455; and *Green v Sutton* (1840) 2 Mood & R 269, 174 ER 285);

(b) by giving guarantees (*Brettel & Ors v Williams* & Ors (1849) 4 Exch 623, [1843–60] All ER 702) unless, of course, giving guarantees is the usual and the common line of business of the firm (*Crawford v Stirling* (1802) 4 Esp 207, (1755–1802) All ER Rep 553);

(c) by submitting to arbitration (*Stead v Salt* (1825) 3 Bing 101, 130 ER 452); and

(d) by operating a bank account in his own name (*Alliance Bank Ltd v Kearsley* (1871) LR 6 CP 433).

In the context of the present appeal, the first defendant had no implied authority to sign the subcontract on behalf of the second defendant and therefore the execution of the subcontract by the first defendant could not, in law, bind the second defendant at all.

Radin Baharuddin bin Radin Hj Munir deposed in his affidavit in reply in encl 9 in regard to the subcontract and there he questioned the existence of the subcontract. He emphasized that the subcontract was not dated and he too highlighted the fact that the main contract was not exhibited at all by

the plaintiff in encl 7. As I said, there was no reply to encl 9, and, consequently, an O 14 application would not be the appropriate course of action for the plaintiff to undertake.

The letters of demand or the notices of demand as seen in exh 'CSP3' of encl 7 dated 18 June 1999 and as seen in the same exhibit of the same enclosure dated 11 October 1999 which were, incidentally, alluded to earlier were not accompanied by any proof of posting. The second defendant disputed that these two letters of demand or notices of demand were ever received by them and bereft of the proof of service, the stand of the second defendant was that there was no cause of action against them. There was no attempt at all by the plaintiff to show by affidavit evidence that these two letters of demand or notices of demand were in fact served onto the second defendant like what the appellant in the case of *Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 MLJ 413 did.

Next, the two letters of demand or the notices of demand merely claimed for the sum of RM351,386.84 and the sum of RM111,255.82 was not even mentioned at all. It would be ideal to reproduce these two letters of demand or the notices of demand. The letter of demand or the notice of demand dated 18 June 1999 was worded in this way (see exh 'CSP3' of encl 7):

990377 AKH

18 June 1999

By AR Registered Post

CM-RB-KCKN Joint Venture
5th Floor, Block B
Wisma Samantan
No 12, Jalan Gelenggang
Bukit Damansara
50490 Kuala Lumpur

Dear Sirs,

KLIA APRONS & TAXIWAYS W2/X3-SOUTH
CONTRACT NO KLIA/D/RAO5/042/95
LAYING OF PAVEMENT QUALITY CONCRETE — LABOUR AND EQUIPMENT ONLY

We act for Pembinaan Thin Chai Sdn Bhd, the subcontractor for the abovementioned works.

We are instructed by our client that despite they having completed the said works in accordance with the terms of the said subcontract and having rendered to you their final progress claim dated 8 April 1998 for the sum of RM351,386.84, you have failed, refused and or neglected to pay to our client the said sum or any part thereof.

We are therefore instructed to demand from you, which we hereby do, the said sum of RM351,386.84.

TAKE NOTICE that unless you pay to our client the said sum of RM351,386.84 together with our notice charges of RM105 within SEVEN (7) DAYS from the date hereof, we have strict instructions to commence legal action against you to recover the same with interest and costs.

Yours faithfully,
for CHOOI & COMPANY
Sgd (Illegible).
AJIT KUMAR HASTIR
cc: client

While the letter of demand or the notice of demand dated 11 October 1999 was phrased in this manner (see also exh 'CSP3' of encl 7):

990377 AKH

11 October 1999

BY AR REGISTERED POST

CITRA MUDA SDN BHD
5th Floor, Block B
Wisma Semantan
No 12, Jalan Gelenggang
Bukit Damansara
50490 Kuala Lumpur

READYBUILT (M) SDN BHD
2050-1, Kompleks Belia 4B
Jalan Sentul Pasar
5100 Kuala Lumpur

Dear Sirs

KLIA APRONS & TAXIWAYS W2/X3-SOUTH
CONTRACT NO KLIA/D/RAO5/042/95
LAYING OF PAVEMENT QUALITY CONCRETE — LABOUR AND EQUIPMENT ONLY

We act for Pembinaan Thin Chai Sdn Bhd, the subcontractor for the abovementioned works.

We are instructed by our client that by a letter of acceptance dated 12 May 1997, our client was awarded the above contract by you, operating under the style 'CM-RB-KCKN Joint Venture' with your other joint venture partner Konsorsium Citra Kontraktor Nusantara.

We are further instructed by our client that despite they having completed the said works in accordance with the terms of the above contract and having rendered to you their final progress claim dated 8 April 1998 for the sum of RM351,386.84, they have not been paid that sum or any part thereof to date.

Furthermore, the retention sum to be paid by 1 April 1998 also remains unpaid.

As joint venture partners, our client holds each of the joint venture partners jointly and severally liable for payment of the said sum of RM351,386.84 and the retention sum.

We are therefore instructed to demand from you, which we hereby do, the said sum of RM351,386.84 and the retention sum payable.

TAKE NOTICE that should you fail to pay to our client the said sum of RM351,386.84 and the retention sum payable together with our notice charges of RM105 within FOURTEEN (14) DAYS from the date hereof, we have strict instructions to commence legal action against you to recover the same with interest and costs.

Yours faithfully,
for CHOOI & COMPANY
Sgd (Illegible).
AJIT KUMAR HASTIR

cc:clients

By Fax No 9438063 & POST

To confound the matter further, there was no supporting document to prove the exact amount that was claimed by the plaintiff (see the averments in paras 22–23 of encl 9).

Conclusion

On the facts, this was certainly not a case for an O 14 application. It was foolhardy on the plaintiff's part to seek summary judgment against the second defendant under an O 14 application. On the facts, the plaintiff could not prove its claim clearly. The second defendant, on the other hand, was able to show that there were triable issues to be tried. This was not the case where 'the judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant' (per Jessel MR in *Anglo-Italian Bank v Wells and Davies* (1878) 38 LT 201).

For the reasons adumbrated above, I accordingly dismissed the appeal in encl 11 with costs.

Appeal dismissed with costs.

Reported by D Sivalingam